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March 16, 2005

BY E-FILING

The Honorable Kent A. Jordan
United States District Court
844 N. King Street
Wilmington, DE 19801

Re: Hamilton v. Levy, et al., C.A. No. 94-336-KAJ

Dear Judge Jordan:

This letter contains citations and legal authority for the open jury instruction issues.

First, as to punitive damages, the Supreme Court in a failure to protect case has held that punitive damages may go to a jury under a charge similar to that proposed by Mr. Hamilton in this case. Smith v. Wade, 461 U.S. 30, 56 (1983). According to the Court:

> We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protective rights of others. We further hold that this threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness.

Id.

Second, the Third Circuit places the burden of proof on qualified immunity on the defendants:

> We therefore hold that in § 1983 actions the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact by a preponderance of the evidence that, under the standards of *Wood v. Strickland*, official immunity should attach.

Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53, 61-62 (3d Cir.) (in banc), cert. denied, 429 U.S. 979 (1976). See also Black v. Bayer, 672 F.2d 309, 316 (3d Cir., 1982) (holding that defendant must establish qualified immunity "as a defense by evidence presented at trial") (overruled on other grounds in D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1368 n.7 (3d Cir. 1992)).

Third, defendants' proposed instruction on deliberate indifference (3.5B) seriously misstates the law. First, in the first sentence, the defendants improperly attempt to re-define deliberate indifference. According to the court of appeals, the standard is this:

> The defendants violated Hamilton's Eighth Amendment rights only if they acted with deliberate indifference to his safety; in other words, to be liable, the defendants must have known that Hamilton "face[d] a substantial risk of serious harm" and they must have "disregard[ed] that risk by failing to take reasonable measures to abate it."

Hamilton v. Levy, 322 F.3d 776, 786 (3d Cir. 2003). This language directly defines deliberate indifference as a two-part test (knowledge plus disregard), and this language is the standard stated in plaintiff's proposed instruction 3.3A, which the Court has accepted.

Defendant's proposal in 3.5B changes this standard in numerous ways. In the first sentence, for example, the defendants expand the standard to require "actual awareness" and "deliberate indifference." The defendants then define deliberate indifference as actual awareness coupled with "deliberately took no action to eliminate the risk or prevent the harm." The Third Circuit standard articulated in Hamilton, however, is not "deliberately took no action to eliminate the risk or prevent the harm" – it is, instead, that the defendants "disregard[ed] that risk by failing to take reasonable measures to abate it." Hamilton, 322 F.3d at 786.

The Court of Appeals reached a similar result in Beers-Capitol v. Whetzel, 256 F.3d 120, 133 (3d Cir. 2001):

> From Farmer and Hamilton we extract the following precepts. To be liable on a deliberate indifference claim, a defendant prison

> official must both "know[] of and disregard[] an excessive risk to inmate health or safety." Farmer, 511 U.S. at 837. The knowledge element of deliberate indifference is subjective, not objective knowledge, meaning that the official must actually be aware of the existence of the excessive risk; it is not sufficient that the official should have been aware. See id. at 837-38. However, subjective knowledge on the part of the official can be proved by circumstantial evidence to the effect that the excessive risk was so obvious that the official must have known of the risk. See id. at 842. Finally, a defendant can rebut a prima facie demonstration of deliberate indifference either by establishing that he did not have the requisite level of knowledge or awareness of the risk, or that, although he did know of the risk, he took reasonable steps to prevent the harm from occurring. See id. at 844.

(emphasis supplied).

Nor is it necessary or proper for the Court to include references to criminal recklessness or negligence. Farmer does indeed mention both terms, but only because the Farmer Court faced the question of which standard applied. The Farmer court decided that the qualified immunity standard was akin to criminal recklessness, but then defined "criminal recklessness" in language that is already in Instruction 3.3A, Hamilton, and Beers-Capitol:

> The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of which he is aware.
>
> * * *
>
> We reject petitioner's invitation to adopt and objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety.

Farmer v. Brennan, 511 U.S. 825, 836-837 (1994).

There is no need to redefine this clear standard for the jury by first injecting the term "criminal recklessness" and then injecting a definition of negligence to illustrate a meaning of criminal negligence. Deliberate indifference needs no other definition than the definition given by the Supreme Court in Farmer and the Court of Appeals in this case.

Fourth, immediately after the charge conference ended, the parties agreed to language for the superseding cause instruction, e.g., that the first paragraph will be eliminated and the last sentence of the second paragraph will be eliminated.

Fifth, the Court directed the parties to discuss Instruction 3.5C (Official Immunity). Because plaintiff's objection on making this fact issue and issue for the jury is overruled, plaintiff's remaining objections are as follows. The second sentence in the second paragraph is unnecessary. The last sentence of that paragraph ("you may consider the employee's circumstances" is not directly reflected in the case law, but, more importantly, is encapsulated by the sentence earlier in the paragraph when it discusses "reasonable correctional employee[s] in the same circumstances." The final paragraph of the proposed instruction is unnecessary, as the verdict form will require the jury to make a separate determination as to each defendant, and the way the first sentence is worded, it states that the jury must find for "each defendant . . ." This contradicts the particularized, employee by employee inquiry that is required under the law.

Finally, on damages (Instruction 5.0A), Mr. Hamilton will withdraw the fourth listed item of damages ("compensation for the violation of his constitutional rights").

Respectfully submitted,

/s/

John W. Shaw

JWS/pt
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